72-1301

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1301

MICHAEL SMITH, *Petitioner*

v.

COMMONWEALTH OF VIRGINIA, *Respondent*

## PETITION FOR A WRIT OF CERTIORARI

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### CITATION TO OPINION BELOW

The Order of the Supreme Court of Virginia denying petitioner's Petition for Writ of Error is not reported but is appended herewith.

### JURISDICTION

The judgment of the Supreme Court of Virginia was entered on December 26, 1972. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

### CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONST. AMENDMENT 4

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no

Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

### U.S. Const. Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

### U.S. Const. Amendment 14

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATUTORY PROVISIONS INVOLVED

§ 19.1-83. Code of Virginia, 1950, as amended.—If there be complaint on oath, supported by the affidavit required by § 19.1-85, that personal property has been stolen, embezzled, or obtained by false pretenses, and that it is believed to be concealed in a particular house or other place, a justice of the peace, or a judge of any court having jurisdiction of the trial of criminal cases

to whom complaint is made, if satisfied that there is reasonable cause for such search, shall issue a warrant to search such place for the property.

§ 19.1-84. Code of Virginia, 1950, as amended.—On like complaint, on oath, according to the nature of the case, supported by the affidavit required by § 19.1-85 such justice or judge to whom it is made, if satisfied that there is reasonable cause therefor, shall issue a warrant to search specified places for the following things:

(1) Counterfeit or spurious coin, forged bank notes, and other instruments or writings, or any tools, machines or materials for making them;

(2) Any obscene book, print, picture, figure, object or thing used or intended for use in violation of article 3 (§ 18.1-227 et seq.) of chapter 4 of Title 18.1;

(3) Lottery tickets, or materials unlawfully made, provided or procured for drawing a lottery;

(4) Any gaming apparatus or implements used, or kept and provided to be used, in lawful gaming or in any place resorted to for unlawful gaming;

(5) Weapons or other objects used in the commission of a crime;

(6) Any controlled drug as defined in article 1 (§ 54-524-1 et seq.), chapter 15.1 of Title 54 of the Code of Virginia, used or possessed in violation of § 18.1-345 or §§ 54-524.1 to 54.524.109, inclusive, of the Code of Virginia;

(7) Fireworks or firecrackers on the premises of a merchant or vendor where a business is conducted and where possession or sale of same is unlawful;

(8) Game and fish illegally taken, and illegal devices used in taking game and fish.

§ 19.1-85. Code of Virginia, 1950, as amended.—No search warrant shall be issued until there is filed with the officer authorized to issue the same an affidavit of some person reasonably describing the house, place, vehicle or baggage to be searched, the things to be searched for thereunder, alleging briefly material facts, constituting the probable cause for the issuance of such warrant and alleging substantially the offense in relation to which such search is to be made. Such affidavit shall be certified by the officer who issues such warrant to the county clerk of his county or to the court clerk, admitting deeds to record, of his city and shall by such clerk be preserved as a record and shall at all times be subject to inspection by the public. No such warrant shall be issued on an affidavit omitting such essentials, and no general warrant for the search of a house, place, compartment, vehicle or baggage shall be issued.

§ 19.1-90. Code of Virginia, 1950, as amended.—Process for the arrest of a person charged with a criminal offense may be issued by:

(1) The judge, in vacation as well as in term, or clerk of any circuit or corporation court exercising criminal jurisdiction; or

(2) The judge, or clerk of any county or municipal court exercising criminal jurisdiction; or

(3) The judge of any juvenile and domestic relations court; or

(4) Any police justice as defined by § 16.1-70; or

(5) Any justice of the peace, unless otherwise provided by law; or

(6) Any other person so authorized by statute.

## QUESTIONS PRESENTED

1. Whether the trial court erred in relying on facts other than those alleged in the search warrant affidavit in determining the existence of probable cause.

2. Whether the affidavit in support of the search warrant failed to establish probable cause.

3. Whether the warrantless search of the automobile was conducted in compliance with the Constitution of the United States.

4. Whether a determination of probable cause to issue the search warrant was made by a neutral and detached magistrate in compliance with the Constitution.

5. Whether the evidence seized pursuant to the search warrant should be suppressed as "fruit of the poisonous tree."

6. Whether the denial of a preliminary hearing constituted a denial of due process under the Fourteenth Amendment to the United States Constitution.

## STATEMENT OF THE CASE

On February 14, 1971, Southampton State Farm correctional authorities, acting on an unidentified informant's tip, stopped Jill Beeson and searched a cake which she had brought into the prison for her husband, Randolph Beeson. The search produced a white powder substance suspected of being heroin. (Tr. 78-79) Mr. Purvis, the Superintendent of Southampton, requested the assistance of Sheriff Brooks in checking the car of the person whom he thought had driven Mrs. Beeson to the prison. (Tr. 78)

Upon arrival at the State Farm, Sheriff Brooks and Mr. Purvis approached the car occupied by the petitioner, Michael Smith. (Tr. 35, 80) At this point, Mr. Purvis asked Mr. Smith if he had driven Mrs. Beeson to the prison and Mr. Smith responded in the affirmative. (Tr. 35) Sheriff Brooks then asked the petitioner for his driver's license and registration. He produced the license and began looking in the glove compartment of his car for the registration. (Tr. 35) It is not clear whether petitioner was formally placed under arrest for being an accessory at this point (Tr. 87), or whether the actual arrest occurred a few moments later when Sheriff Brooks sat down next to him in the passenger's seat. (Tr. 38)

After getting into the car, Sheriff Brooks questioned petitioner without giving him any *Miranda* warnings. Petitioner refused Sheriff Brooks access to the glove compartment of the car, saying only that "it didn't contain a gun." Petitioner was placed under arrest, the car was impounded, and petitioner was removed to the county jail.

At the jail, Sheriff Brooks and Mr. Johnson (another prison official) presented a two-page "Affidavit for Search Warrant" (a copy of which has been appended to this Petition) to the Clerk of the County Court which was sworn to before the Clerk. (Tr. 116) Without pause or hesitation, the Clerk issued the search warrant authorizing the police to search the automobile. (Tr. 40, 41)

Sheriff Brooks conducted a search of the automobile, which search produced a spoon, two pipes, a small quantity of marijuana and a partially smoked cigarette. (Tr. 51) A laboratory test later revealed a

small quantity of heroin on the spoon (Tr. 207) and traces of marijuana in the pipes (Tr. 206, 207) and cigarette. (Tr. 208)

Petitioner was charged with possession of marijuana and distribution of heroin, (Tr. 54) and was released on bail. (Tr. 123) After the laboratory tests were received, petitioner was also charged with possession of heroin.

On the day of the preliminary hearing, the Commonwealth *nolle prosse'd* the case to avoid the mandatory preliminary hearing. (Tr. 6) Michael Smith's case was then presented to the grand jury which returned indictments against him for possession of controlled substances: heroin and marijuana. (Tr. 8) He was never indicted as an accessory to the distribution of heroin charge which originated out of Mrs. Beeson's bringing the cake into the prison.

Prior to trial, counsel for petitioner moved to quash the indictment arguing that petitioner had been denied his statutory right to a preliminary hearing. (Tr. 3, 4) Counsel for petitioner also moved to suppress the narcotics seized pursuant to the search warrant of February 15 because the Clerk had no authority to issue a search warrant, because certain statements had been received in violation of *Miranda*, and because there was no probable cause to search. (Tr. 14, 164)

At the conclusion of the trial, counsel for petitioner orally renewed his various motions (Tr. 230), and also moved to strike the Commonwealth's evidence pursuant to Rule 3A:22(a) of the Virginia Rules of Criminal Procedure. (Tr. 234) The judge denied these motions and found petitioner guilty as charged. (Tr. 238)

Following a review of the presentence report and arguments of both attorneys, Michael Smith, on April 17, 1972, was sentenced to three (3) years for possession of heroin and one (1) year for possession of marijuana, the sentences to run concurrently. (Tr. 246)

Petition for Writ of Error was timely filed and argued before the Supreme Court of Virginia. On December 26, 1972, the Petition for Writ of Error was denied.

## REASONS FOR GRANTING THE WRIT

### I. THE TRIAL COURT ERRED IN RELYING ON FACTS OTHER THAN THOSE ALLEGED IN THE SEARCH WARRANT AFFIDAVIT IN DETERMINING THE EXISTENCE OF PROBABLE CAUSE AND THE EFFICACY OF THE SEARCH WARRANT.

This Court has repeatedly held that trial courts, in examining search and arrest warrants for probable cause, may consider only those facts brought to the Magistrate's attention at the time of its issuance. *Aguilar* v. *Texas,* 378 U.S. 108 (1964).

The limiting of the Court's review to the "four corners of the document" was further emphasized by this Court in *Spinelli* v. *United States,* 393 U.S. 410 (1969).

In denying petitioner's Motion to Suppress, however, the trial court below specifically considered three factors, none of which were brought to the attention of the issuing Clerk when application was made for the search warrant. The first factor was that there was "a Maryland car near the Farm entrance." (Tr. 164, ln. 12) The second was that the petitioner, Mr. Smith, "had shown signs of being intoxicated or under drugs from the manner in which he entered or left the place." (Tr. 164, ln. 13-15) The third was that

the cake actually contained heroin. (Tr. 164, ln. 18) The first two are nowhere stated in the Affidavit (see Appendix), and the third is stated in the Affidavit in far less precise and definite form. (The Affidavit, a copy of which has been included in the Appendix to this Petition, states: "Cake delivered by Jill Beeson to Randolph Beeson contained what appeared to be heroin . . . .") Additionally, it is clear from the record that the only information presented to the Clerk was in the form of the Affidavit. There were no verbal exchanges between the affiants and the Clerk. (Tr. 116-117)

By denying petitioner's motion, the trial court below violated clear judicial doctrine requiring that an Affidavit supporting a search warrant stand on its own merit, and that consideration of its efficacy be limited to the "four corners" of the document and to only that information known to the Magistrate at the time of issuance.

**II. THE AFFIDAVIT IN SUPPORT OF THE SEARCH WARRANT FAILS TO ESTABLISH PROBABLE CAUSE IN THAT IT DOES NOT MEET THE CONSTITUTIONAL REQUIREMENTS AS SET FORTH BY THE SUPREME COURT OF THE UNITED STATES.**

The Affidavit in support of the search warrant not only fails to meet the standards of *Aguilar* v. *Texas, supra,* and *Spinelli* v. *United States, supra,* but also fails to state any probable cause for the searching of petitioner's automobile. Neither the informant nor his information are shown to be reliable and there is nothing which could lead an independent Magistrate (Clerk) to conclude that narcotics were presently being stored in petitioner's automobile.

**A. Informant**

Paragraph 2(1) of the Affidavit in support of the search warrant of February 15 states that:

> I have received reliable information from a reliable informant who states that he thought Randolph Beeson was to receive some dope on February 15, 1971. The dope was to be delivered in some form of cake. Informant has delivered to the affiants quantities of dope (hashish A-1) in the past. Informant was to receive a quantity of dope on February 21, 1971, after paying $30.00 in marked currency for said dope on February 15, 1971.

In *Aguilar* v. *Texas, supra,* this Court established the two prong test which magistrates must apply to hearsay in affidavits. The magistrate

> 1) Must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and 2) some of the underlying circumstances from which the officer concluded that the informant . . . was credible or his information reliable. *Supra,* at 114. See also *Spinelli* v. *United States, supra.*

As to the first test, the Affidavit is devoid of any facts or circumstances which show how he arrived at his conclusion. In fact, all the informant says is "that he thought Randolph Beeson was to receive some dope." How the informant arrived at this thought is nothing less than a mystery. The informant also was to receive "dope" in the future, but the Affidavit gives no indication from whom the informant was to receive this "dope."

As to the second test, the informant's reliability is based upon an assertion that he delivered "quantities of dope" to the affiants in the past. Under questioning, it was revealed that the informant "delivered" dope on only one occasion to one of the affiants. (Tr. 101, 102) There is no showing in the Affidavit that the informant ever supplied information which led to arrest or conviction or even investigation of criminal activity. In fact, there is no showing that the informant ever supplied information of any kind or was in any way a truthful person. Thus, there was no probable cause to search Jill Beeson and there was no probable cause to search the petitioner.

**B. No Probable Cause To Search Petitioner**

Even if it assumed *arguendo* that there was probable cause to search Jill Beeson, there is nothing in the Affidavit to support a search of petitioner's automobile. Paragraph 2(4) of the Affidavit states "Jill Beeson and Michael Smith in auto together and have known each other two years." This is the same type of allegation found in *Spinelli* v. *United States, supra,* which this court characterized as " . . . [A] bald and unilluminating assertion of suspicion that is entitled to no weight in appraising the magistrate's decision. [citing] *Nathanson* v. *United States,* 290 U.S. 41, 46, 78 L.Ed. 159, 161, 54 S.Ct. 11 (1933)." *Spinelli* v. *United States, supra,* at 414, 21 L.Ed.2d at 643.

Therefore, the first four paragraphs would give the magistrate no indication whatever that dope is to be found in the car. Likewise, paragraph 2(6) is merely a statement of ownership and possession from which the magistrate could draw no conclusions.

The entire strength of the Affidavit rests on paragraph 2(5), for even if the magistrate concluded that the cake containing the suspected heroin came from the car, there is nothing in paragraphs 1-4, or 6 indicate that the cake didn't contain the only narcotics ever to have been in that car.

Paragraph 5 of the Affidavit states that:

> Michael Smith in producing registration and ownership cards from the glove compartment, concealed contents of the compartment from view. Michael Smith refused access to the compartment saying only "that it didn't contain a gun." When asked if there was any dope in the glove compartment, Michael Smith replied, "I won't say, all I can say is there is no gun in there."

This paragraph states two basic things: 1) petitioner refused to permit the officers to see what was in the glove compartment, and 2) petitioner refused to answer a question as to whether or not the compartment contained narcotics. The first item is a clear exercise of Fourth Amendment rights. The second is a clear exercise of Fifth Amendment rights.

Every citizen has the privilege to exercise every right guaranteed him by the Constitution. Petitioner's refusal to permit Sheriff Brooks to see what was in his glove compartment is a right every citizen is entitled to exercise and which is guaranteed by the Fourth Amendment. However, because petitioner refused to permit the inspection, this refusal was used to establish probable cause against him. A citizen under this system is faced with no choice: either let the police search with consent; or let the police use the failure to grant consent as the basis for the search warrant.

Petitioner also declined to discuss whether or not the glove compartment contained narcotics. To use the Fifth Amendment right as the basis for probable cause places the petitioner in a position of losing one right in order to exercise another. The petitioner also stated the glove compartment did not contain a gun, but this is no more than an assurance to nervous officers that violence would not be required.

As has been shown, the entire Affidavit rests on paragraph 2(5). Paragraph 2(5) contains no more than an assertion of petitioner's Fourth Amendment and Fifth Amendment rights. Therefore, the Clerk found probable cause based solely on petitioner's exercise of his Fourth and Fifth Amendment rights. The outrageousness of this situation is self-evident.

## III. THE SEARCH OF THE AUTOMOBILE COULD NOT HAVE BEEN LEGALLY CONDUCTED IN THE ABSENCE OF A VALID SEARCH WARRANT.

### A. A Warrantless Search of the Automobile Could Not Have Been Conducted as There Was No Probable or Reasonable Cause To Believe That the Automobile Contained Either the Instrumentality of a Crime or Evidence Pertaining to a Crime

In *Carroll* v. *United States*, 267 U.S. 132 (1925), this Court held that contraband goods concealed and illegally transported in an automobile may be searched for without a warrant *only* if there is a reasonable or probable cause to believe that those goods are *contained in the automobile*. In *Dyke* v. *Taylor Implement Mfg. Co., Inc.*, 391 U.S. 216 (1968), Mr. Justice White, speaking for the Court, opined that for a warrantless search of an automobile to be upheld, this Court has:

> . . . always insisted that the officers conducting the search have "reasonable or probable" cause to

> believe that they will find the *instrumentality o*
> *a crime or evidence pertaining to a crime* before
> they begin their warrantless search. *Supra,* a
> 221. (Emphasis supplied)

In 1970, this court decided *Chambers* v. *Maroney*, 39
U.S. 42 (1970), a case which appeared to hold that i
the police could search a vehicle for any reason at the
time of the initial arrest, then a similar search without
a warrant would be valid at any subsequent time.

Questions and issues raised by the Court's decision
in *Chambers* were in part resolved by the Supreme
Court in *Coolidge* v. *New Hampshire,* 403 U.S. 443
(1971). There, the Court clearly stated that *Cham-
bers:* "[H]eld only that, where the police may stop
and search an automobile under *Carroll,* they may also
seize it and search it later at the police station." *Cool-
idge, supra* at 463. Accordingly, the *Chambers* doc-
trine never comes into play if the search fails for want
of probable or reasonable cause under the criteria set
forth in *Carroll.*

The police officials had no probable cause under *Car-
roll,* or *Chambers,* or *Coolidge* to search this automobile
either with or without a search warrant.

Sheriff Brooks testified that based on what happened
inside of the prison, he didn't have "any evidence"
upon which to obtain a search warrant to search the
car. (Tr. 63) This being the case, the encounter be-
tween the petitioner, Mr. Purvis and Sheriff Brooks
in the parking lot would have had to supply the requi-
site probable cause to justify a warrantless search at
that time. However, the only additional facts uncov-
ered by Sheriff Brooks and Mr. Purvis were that the

car belonged to the petitioner's father, that the glove compartment did not contain a gun, and that petitioner refused to consent to a search of the glove compartment. There was clearly no reasonable or probable cause to believe that a search of the car would disclose "instrumentality of a crime or evidence pertaining to a crime." *Dyke* v. *Taylor Implement Mfg. Co., Inc.*, 391 U.S. 216 (1968).

Even if all the facts as alleged were stipulated as true, there would have been no more probable cause to search the automobile at the Southampton Farm then there would have been to search a taxicab if it had driven Mrs. Beeson to the farm.

**B. A Warrantless Search of the Automobile Could Not Have Been Legally Justified as a Search Incident to a Valid Arrest Since the Defendant Had Already Been Arrested and Removed from the Car Prior to Its Being Searched**

The rationale behind a search incident to an arrest is to remove weapons or prevent the destruction of evidence. *Chimel* v. *California*, 395 U.S. 752 (1969).

Since the arresting officer is no longer in danger when the suspect has been removed from his car, arrested and searched, and since the danger of destruction of evidence in the car has likewise been removed, the justification for searching the car at a later time under the "search incident to arrest" rationale is removed. Such was the situation in the case at bar.

In a situation very similar to the case at bar, the Court in *Preston* v. *United States*, 376 U.S. 364 (1964), reversed a conviction which was based on a search exe-

cuted in violation of the Fourth Amendment of the United States Constitution.

> Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest. *Supra,* at 367.

The search in the instant case could not have been justified as incident to a valid arrest since the danger of harm to the officer or destruction of any evidence had long since been removed.

Since the police authorities search of petitioner's automobile could not be properly viewed as a search incident to an arrest, or as a warrantless search under *Chambers,* the absence of a legally sufficient warrant is fatal to the search.

### C. A Warrantless Search of the Automobile Could Not Have Been Legally Justified as a Search Incident to a Valid Arrest Since the Arrest Itself Was Invalid

Assuming *arguendo,* the truth of the facts alleged, there was absolutely no probable cause to believe that petitioner knew of the contents of the cake or the illicit activities of Jill Beeson. There are no facts upon which the police officers could conclude other than that petitioner was helping a friend visit her husband.

## IV. THE SEARCH WARRANT OF FEBRUARY 15 WAS ILLEGAL AS A DETERMINATION OF PROBABLE CAUSE WAS NOT MADE BY A NEUTRAL AND DETACHED MAGISTRATE OR JUDICIAL OFFICER AS REQUIRED BY THE UNITED STATES CONSTITUTION, THE CONSTITUTION OF VIRGINIA AND THE CODE OF VIRGINIA, 1950, AS AMENDED.

The search warrant in the case at bar was sworn to and issued by a Clerk of the County Court of Southampton County. Chapter 5, §§ 19.1-83, *et seq.,* of the

Virginia Code deals with the issuance of search warrants. Sections 19.1-83 and 19.1-84 specifically provide that:

> . . . a justice of the peace, or a judge of any court having jurisdiction of the trial of the criminal cases to whom it is made, if satisfied that there is reasonable cause for such search, shall issue a warrant to search . . . .

Clearly, nowhere in Chapter 5 is the Clerk of the County Court given the authority to issue a search warrant or determine probable cause. In sharp contrast, § 19.1-90(1, 2) of the Code of Virginia, as amended, empowers clerks of the circuit and county courts to issue *arrest* warrants. A common sense reading of the various relevant sections makes it clear that the Virginia Assembly wanted to empower circuit and county court clerks to issue arrest warrants while specifically withholding from them the power to issue search warrants.

The function of the neutral and detached Magistrate weighing the law and the facts in determining probable cause is essential to the life of the Fourth Amendment. The Supreme Court has time and time again spoken to the issue:

> Although the reviewing court will pay substantial deference to judicial determinations of probable cause, the court must still insist that the magistrate perform his "neutral and detached" function and not serve merely as a rubber stamp for the police.

*Aguilar, supra,* at 111. See also *Coolidge, supra.*

This is not an idle fear. Clerks without judicial powers or responsibilities could easily and unknow-

ingly become the "rubber stamp" referred to by the Supreme Court.

The facts in the case at bar serve as a classic example of this pitfall. While the Affidavit cries out with questions to be answered, the record is completely devoid of any evidence suggesting that the Clerk conducted any inquiry into the Affidavit for the warrant or that her actions were based upon a "neutral and detached" examination of the evidence and facts underlying the Affidavit.

Nothing in the Affidavit was examined by the Clerk. In point of fact, upon submission of the statement of Sheriff Brooks and Mr. Johnson, the Clerk merely administered the oath and without pause or hestitation issued the warrant. (Tr. 40, 41, 43, 116) The Clerk's failure to scrutinize the Affidavit denied petitioner a "determination" by a neutral and detached magistrate. *Johnson* v. *United States*, 333 U.S. 10 (1948).

**V. THE EVIDENCE SEIZED PURSUANT TO THE SEARCH WARRANT OF FEBRUARY 15 SHOULD BE SUPPRESSED SINCE IT WAS A FRUIT OF THE POISONOUS TREE IN THAT A STATEMENT TAKEN IN VIOLATION OF MIRANDA WAS RELIED UPON IN THE AFFIDAVIT TO ESTABLISH PROBABLE CAUSE.**

In *Mathis* v. *United States*, 391 U.S. 1 (1968), the Supreme Court held that the obligation to give the *Miranda* warnings attaches even when the accused is in custody for a different crime than the one under investigation. *In Orozco* v. *Texas*, 394 U.S. 324 (1969), the Court explained that *Miranda* encompassed all police interrogations where the accused was not free to leave.

The facts of the present case place it squarely within the ambit of the *Miranda* line of decisions. When

Sheriff Brooks and Mr. Purvis approached the petitioner's car, there was no question in their minds but that they would place him under arrest. (Tr. 68) Mr. Purvis, by his own testimony, knew that the petitioner was the person who drove Mrs. Beeson to the Southampton Correctional Farm. (Tr. 79) Sheriff Brooks placed Mr. Smith under arrest for being an accessory to the crime of the distribution of heroin, an act that had already been concluded. This arrest was based solely on the fact that petitioner had driven Mrs. Beeson to jail. Clearly, petitioner was not free to leave and Mr. Purvis testified that he thought Sheriff Brooks had informed the petitioner that he was under arrest before he sat down next to him in the car. (Tr. 87) Under any interpretation of the facts, however, when Sheriff Brooks began questioning petitioner regarding the contents of the glove compartment, he was not free to leave and, hence, should have been given the *Miranda* warnings.

The undisputed testimony of both Sheriff Brooks and Mr. Purvis support the conclusion that the investigation at this point was clearly accusatory. As a result, petitioner should have been given full *Miranda* warnings before any questioning began.

In the Affidavit in support of the search warrant of February 15, two statements taken attributed to the defendant were relied upon. Both of these statements were in violation of *Miranda* and, as such, were illegal. The primary illegality (the two statements) was directly relied upon to establish probable cause to search the automobile.

Applying *Wong Sun* v. *United States*, 371 U.S. 471 (1963) to the facts of the case at bar, the inescapable

conclusion is that the evidence seized must be excluded as "a fruit of the poisonous tree".

**VI. THE DENIAL OF A PRELIMINARY HEARING CONSTITUTED A DENIAL OF PETITIONER'S RIGHT TO DUE PROCESS OF LAW.**

Subsequent to petitioner's arrest, and pursuant to § 19.1-163.1 of the Code of Virginia, as amended, a preliminary hearing was scheduled. As indicated in the Statement of the Case, however, on the day of the preliminary hearing, the Commonwealth *nolle prosequi'd* the case to avoid the mandatory preliminary hearing. Thereafter the case was presented to the grand jury and petitioner was indicted on the same charges previously *nolle prosequi'd*.

The Code of Virginia, § 19.1-163.1, states that:

> No person who is arrested on a charge of felony shall be denied a preliminary hearing upon the question of whether there is reasonable ground to believe that he committed the offense and no indictment shall be returned in a court of record against any such person prior to having such a hearing unless such hearing is waived in writing.

*Webb*. v. *Commonwealth*, 204 Va. 24 (1963), stood for the proposition that § 19.1-163.1 prevents the Commonwealth from reaching that end. The court in *Webb* specifically stated that § 19.1-163.1 was enacted to change the holding of *Benson* v. *Commonwealth*, 190 Va. 744 (1950). In *Benson*, the defendant had been arrested, and when he insisted on a preliminary hearing, the attorney for the Commonwealth dismissed the charges. The defendant was later indicted by the grand jury, and the Supreme Court of Virginia held that he no longer had the right to a preliminary hear-

ing. *Webb* makes it clear that the Commonwealth is no longer free to circumvent the rights of the accused in this manner.

The failure of state courts to apply their own standards and requirements as defined by state law, is a patent violation of petitioner's right to due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

## CONCLUSION

Wherefore, petitioner prays that this petition for a writ of certiorari be granted.

Respectfully submitted,

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# APPENDIX

## APPENDIX

VIRGINIA:

*In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday the 26th day of December, 1972.*

The petition of Michael John Smith for writs of error and supersedeas to judgments rendered by the Circuit Court of Southampton County on the 17th day of April, 1972, in prosecutions by the Commonwealth against the said petitioner for a felony (Indictment No. 47-1971, Possession of Heroin) and a misdemeanor (Indictment No. 48-1971, Possession of Marijuana), having been maturely considered and transcripts of the records of the judgments aforesaid seen and inspected, the court being of opinion that there is no reversible error in the judgments complained of, doth reject said petition and refuse said writ of error and supersedeas in each of these cases, the effect of which is to affirm the judgments of the said circuit court.

A Copy,

Teste:

Howard G. Turner, Clerk

By: /s/ SHOCKLEY D. GARDNER
*Deputy Clerk*

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**Affidavit for Search Warrant**

STATE OF VIRGINIA

COUNTY / CITY of Southampton, to-wit:

Before me, Hyla E. Whitfield, Clerk, this day came R. H. Brooks, Sheriff and G. M. Johnson, Assistant Superintendent of Southampton Correctional Farm, who, after being duly sworn, made oath as follows:

(1) The offense in relation to which search is to be made is substantially as follows: possession and distribution of controlled drugs.

(2) The material facts constituting probable cause for issuance of the warrant are: see attached affidavit.

(3) The articles to be searched for under the warrant are: heroin, marijuana, hashish and other narcotics.

4) The house, place, vehicle or baggage to be searched is described as follows: 1970 Plymouth 2-door sedan "Duster" 1971 Maryland license HP8818 owned by Jack L. Smith and under the control of Michael Smith.

/s/ GENE M. JOHNSON
RYLAND H. BROOKS

Subscribed and sworn to before me this 15th day of February, 1971.

/s/ HYLA E. WHITFIELD

(Seal)

A Copy

Teste: ———— Clerk

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**Warrant on 1970 Plymouth 2-Door Sedan "Duster" 1971 Maryland License #HP8818 Owned by Jack L. Smith and Under the Control of Michael Smith**

(2) [sic.] The material facts constituting probable cause for issuance of the warrant are: (1) I have received reliable information from a reliable informant who states that he thought Randolph Beeson was to receive some dope on February 15, 1971. The dope was to be delivered in some form of cake. Informant has delivered to the affiants quantities of dope (hashish A-1) in the past. Informant was to receive a quantity of dope on February 21, 1971, after paying $30.00 in marked currency for said dope on February 15, 1971.

(2) $30.00 in marked currency found in possession of Jill Beeson after visit with her husband, R. Beeson.

(3) Cake delivered by Jill Beeson to Randolph Beeson contained what appeared to be heroin, based on appearance and field test.

(4) Jill Beeson and Michael Smith in auto together and have know each other two years.

(5) Michael Smith, in producing registration and ownership cards from the glove compartment, concealed contents of the compartment from view. Michael Smith refused access to the compartment saying only "that it didn't contain a gun." When asked if there was any dope in the glove compartment, Michael Smith replied, "I won't say. All I can say is there is no gun in there."

(6) The automobile belongs to Jack Lewis Smith, father of Michael Smith, and is under the control of Michael Smith.

/s/ GENE M. JOHNSON
/s/ RYLAND H. BROOKS

Subscribed and sworn to before me this 15th day of February 1971.

/s/ HYLA E. WHITFIELD
Clerk

A Copy
Teste: /s/ [Illegible] Clerk

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# Supreme Court of the United States

October Term, 1972

No. 72-1301

MICHAEL SMITH,

*Petitioner,*

v.

COMMONWEALTH OF VIRGINIA,

*Respondent.*

## RESPONDENT'S BRIEF IN OPPOSITION TO GRANT OF CERTIORARI

### OPINION BELOW

There is no reported opinion of the Supreme Court of Virginia. The Order rejecting the Petition for Writ of Error is set forth in the Petition for Writ of Certiorari in the Appendix, page 1A.

### JURISDICTION

Petitioner claims that jurisdiction is founded upon 28 U.S.C. § 1257 (3).

### QUESTIONS PRESENTED

1. Was the claim that a denial of a preliminary hearing constituted a denial of due process under the Fourteenth

Amendment properly raised before the Virginia Supreme Court and is it properly before this Court?

2. Is there a substantial federal question presented for review by this Court of the search of an automobile pursuant to a search warrant?

3. Should the "Exclusionary Rule" be modified?

## STATEMENT OF THE CASE

On the morning of February 15, 1971, Southampton State Farm correctional authorities received information from an unnamed informer that narcotics would be smuggled into the institution in a cake. The authorities were further advised that for thirty dollars additional narcotics could be purchased and brought into the institution. The authorities thereupon supplied thirty dollars in marked bills. Later that same day, Jill Beeson brought a cake to her husband, Randolph Beeson, who was an inmate at the correctional facility. The cake was searched and pieces of tin foil were found which contained a white powdery substance suspected of being a narcotic. Jill Beeson was thereafter found to be in possession of the thirty dollars in marked bills (Tr. 91-96).

The local Sheriff was called to the correctional facility to investigate the automobile being operated by the petitioner. Upon arriving at the institution the Sheriff was met by the Superintendent of Southhampton, and the two approached the automobile in which petitioner was seated on the driver's side. The Superintendent asked the petitioner if he had driven Jill Beeson to the institution to which he received an affirmative reply (Tr. 77-80). The Sheriff requested petitioner to produce his driver's license and registration. Petitioner produced his license and then began

to go into the glove compartment. In going into the glove compartment the petitioner acted in a suspicious manner in that he opened it only wide enough to place his hand inside and was attempting to keep the contents of the glove compartments from observation. The Sheriff asked petitioner what he had in the car to which petitioner responded that it was not a gun. The Sheriff then got into the automobile on the passenger side and placed petitioner under arrest for being an accessory (Tr. 35-38).

The petitioner and his automobile were removed to the county jail at which time the Sheriff and another prison official consulted with the local prosecuting attorney about obtaining a search warrant for the automobile. The prosecuting attorney assisted these officials in preparing an affidavit, and a search warrant was secured from the clerk of the county court (Tr. 70-73).

A search of the automobile was then conducted and the evidence which ultimately resulted in petitioner's convictions was seized.

## ARGUMENT AGAINST GRANTING CERTIORARI

### I.

**The Claim That A Denial Of A Preliminary Hearing Constituted A Denial Of Due Process Under The Fourteenth Amendment Was Not Properly Raised Before The Virginia Supreme Court And Is Not Properly Before This Court.**

Prior to trial petitioner moved to quash the indictment on the ground that he had been denied his statutory right to a preliminary hearing. The petitioner never asserted that such a denial would be a denial of due process under the Fourteenth Amendment (Tr. 3-14).

Petitioner assigned as error the trial court's denial of his motion to quash the indictment, however, petitioner never

at any point in his petition for writ of error addressed himself to this point. (See Petition for a Writ of Error.) It is clear that this point has not been presented to the Supreme Court of Virginia.

It was very early established that the United States Supreme Court would not decide federal constitutional issues raised in the Supreme Court for the first time on review of state court decisions. *Cardinale* v. *Louisiana*, 394 U.S. 437 (1969).

The rationale underlying this Court's policy of refusing to review issues raised for the first time in this Court is that in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, *Cardinale, supra*, and to assure that this Court would have an adequate record before it prior to rendering decisions of constitutional magnitude. *Hill* v. *California*, 401 U.S. 797 (1971).

It is therefore apparent that this Court should not grant the petition for writ of certiorari based upon petitioner's claim that he has been denied due process by not having a preliminary hearing. *Beck* v. *Washington*, 369 U.S. 541 (1962); *Rugendorf* v. *United States*, 376 U.S. 528 (1964).

## II.

**No Substantial Federal Question Is Presented For Review By This Court Of The Search Of An Automobile Pursuant To A Search Warrant.**

"A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor." Rule 19, Rules of the Supreme Court of the United States.

The questions presented in the Petition for Certiorari are neither special nor important. The questions revolve

around the sufficiency of an affidavit for a search warrant, and deal solely with the application of rules previously announced by this Court in *Aguilar* v. *Texas,* 378 U.S. 108 (1964), and *Spinelli* v. *United States,* 393 U.S. 410 (1969).

The trial court was called upon to determine whether the affidavit was sufficient to support the issuance of the search warrant, and upon applying the rules enunciated by this Court held the affidavit to be sufficient. The Supreme Court of Virginia has also approved the affidavit, and a review by this Court will not result in the enunciation of any new rules in the area of search and seizure.

The petitioner claims there is no information in the affidavit to show that the informer was either credible or his information reliable. It is true that there is no information in the affidavit to show how the informer knew the narcotics would be brought to the penal institution. However, the informant had delivered narcotics to the correctional authorities before; he knew that the narcotics would be in a cake, and would be delivered to Randolph Beeson. All of this detailed information was verified by the authorities in addition to their finding the marked money on Jill Beeson. As pointed out in *Spinelli, supra:*

> "... In the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation." 393 U.S. at 416.

Clearly, the detailed information of the informant shows that he came by it through personal knowledge. Compare *Draper* v. *United States,* 358 U.S. 307 (1959).

The petitioner also claims there was no probable cause to search the automobile. The authorities knew that an attempt had been made to introduce narcotics into the penal institution; that Jill Beeson was the person who had attempted to make the introduction of the narcotics; that petitioner has driven Jill Beeson to the institution; that Jill Beeson had been given marked money to supply additional narcotics; and that petitioner acted suspiciously when he was opening the glove compartment of his car.

Sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment. *Hill* v. *California,* 401 U.S. 797 (1971). Only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause for the issuance of a search warrant, and in judging probable cause for the issuance of a search warrant, magistrates are not to be confined by niggardly limitations or by restrictions on the use of their common sense. *Spinelli, supra.* The magistrate is obligated to render a judgment based upon a commonsense reading of the entire affidavit. *United States* v. *Ventresca,* 380 U.S. 102 (1964).

The respondent says that probable cause was shown to search the automobile.

The petitioner additionally contends that the search warrant was not issued by a neutral and detached magistrate. The petitioner argues that the Virginia Code sections 19.1-83 and 19.1-84, which deal with search warrants, do not provide for the clerk of a county court to issue a search warrant. The petitioner has failed to point out to this Court that there is another code section which must be considered when determining whether a county court clerk may issue a search warrant. Section 16.1-44 Code of Virginia provides in part:

> "The Clerk shall be a conservator of the peace within the territory for which the court has jurisdiction, and may within such jurisdiction *issue warrants* and processes. . . He may take affidavits and administer oaths . . . and issue all other legal processes which may be issued by the judge of such court. . . ."

Clearly, § 16.1-44 gives the Clerk of the county court the power to issue the same processes which may be issued by the judge. The Virginia Supreme Court has interpreted this section to give the Clerk the authority to issue a search warrant, and this Court must accept the state court's construction of a state statute. *Kingsley International Pictures Corp.* v. *Regents*, 360 U.S. 648 (1959).

Compare this Court's opinion in *Shadwick* v. *City of Tampa*, 407 U.S. 345 (1972), wherein this Court held that the clerk of a municipal court qualified as a neutral and detached magistrate, so as to be authorized under the Fourth Amendment to issue arrest warrants.

The petitioner also maintains that statements taken in violation of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), were used in the affidavit to support probable cause. The respondent maintains that the statements utilized in the affidavit did not violate *Miranda*. In the alternative the respondent states that the affidavit is still sufficient to support probable cause if the petitioner's statements are excluded from the affidavit.

## III.

### The "Exclusionary Rule" Should Be Modified.

The "Exclusionary Rule" was created by this Court in *Weeks* v. *United States*, 232 U.S. 383 (1914), and requires the automatic suppression of reliable and probative

tangible evidence which bears directly upon the fact-finding process.

The purpose of this rule is to insure that the law enforcers do not engage in illegal behavior in ferreting out crime. *Wolf* v. *Colorado*, 338 U.S. 25 (1949); *Elkins* v. *United States*, 364 U.S. 206 (1960). However laudable this purpose, in reality it is a dismal failure. The policeman on the street cannot be expected to grasp the fine technicalities surrounding probable cause when the Courts are hopelessly divided in applying these technicalities to different factual situations. Chief Justice Burger has aptly summed up the frustrations facing law enforcement officers in the field of search and seizure when he noted in his dissenting opinion in *Bivens* v. *Six Unknown Federal Narcotic Agents*, 304 U.S. 388 (1971):

> "Whatever educational effect the rule conceivably might have in theory is greatly diminished in fact by the realities of law enforcement work. Policemen do not have the time, inclination, or training to read and grasp the nuances of the appellate opinions that ultimately define the standards of conduct they are to follow. The issues that these decisions resolve often admit of neither easy nor obvious answers, as sharply divided courts on what is or is not 'reasonable' amply demonstrate. Nor can judges, in all candor, forget that opinions sometimes lack helpful clarity." 403 U.S. at 417.

How much longer can the judicial system withstand the strain of clogged dockets when so much time is spent in suppression hearings which bear little or no relation to the guilt or innocence of the defendant? This case is an excellent example of this waste of judicial efficiency. The motion to suppress in this case occupied most of the Court's time in that it covered 165 pages in the transcript

while the trial itself required less than half that number of pages. Not only has the trial court been required to expend major energies on this matter, but the Supreme Court of Virginia has likewise been required to expend valuable time in reviewing the sufficiency of the search. It is now being asked that this Court also utilize its valuable time to review this matter which bears no relation to the search for truth.

The "Exclusionary Rule" imposes a single, inflexible, and drastic sanction without regard to the nature, circumstances, or degree of the alleged misconduct. Whether the police act in good faith or with the deliberate disregard of the rights of citizens the result is always the same—the evidence is excluded. There is no rational basis for applying the same sanction to an honest mistake and to outrageous misconduct. As Chief Justice Burger stated:

> "Freeing either a tiger or a mouse in a schoolroom is an illegal act, but no rational person would suggest that these two acts should be punished in the same way. * * *
>
> "I submit that society has at least as much right to except rationally graded responses from judges in place of the universal 'capital punishment' we inflict on all evidence when police error is shown in its aquisition." *Bivens, supra,* at 419.

It is now time that this Court recognize the failures of the "Exclusionary Rule" and the frustrations it causes society. The American Law Institute has proposed a model code which would provide that the "Exclusionary Rule" would apply only to a violation of constitutional rights which has been shown to be "substantial."

It is submitted that this Court should reevaluate the "exclusionary rule" and redefine its application.

## CONCLUSION

For the foregoing reasons, the respondent respectfully submits that this Honorable Court should deny the petition for writ of certiorari or grant the writ for the purpose of reevaluating the "exclusionary rule."

Respectfully submitted,

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Supreme Court Building
Richmond, Virginia 23219

## CERTIFICATE OF SERVICE

I, James E. Kulp, Assistant Attorney General of Virginia, counsel for the respondent in the captioned matter and a member of the Bar of the Supreme Court of the United States, do hereby certify that on or before the 21st day of June, 1973, I mailed three copies of the foregoing Brief in Opposition to David Ross Rosenfeld and Philip J. Hirschkop, 108 North Columbus Street, P. O. Box 234, Alexandria, Virginia 22313, counsel of record for petitioner.

JAMES E. KULP
*Assistant Attorney General*